Dato' Tan Heng Chew v Tan Kim Hor & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–23–76 OF 2002
ABDUL MALIK ISHAK J
18 AUGUST 2007

Civil Procedure — Pleadings — Amendment — Delay of 1 year and 7 months — Whether a tactical manoeuvre amounted to abuse of process of court — Whether application for amendment allowed — Principles governing amendment of pleadings — Rules of the High Court 1980 O 20 r 5

Civil Procedure — Pleadings — Amendment — Statement of Claim — Amendment sought after case management with benefit of the defendants' submissions — Amendment to show innuendo — Whether an attempt to introduce extrinsic evidence

By way of a summons in chambers, the plaintiff sought pursuant to O 20 r 5 of the Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the court for leave to substitute the name of the third defendant with the names of the partners and they would be the third to the ninteenth defendants to the present action. The learned Senior Assistanty Registrar ('SAR') gave leave to amend and being aggrieved, the defendants filed an appeal. The plaintiff's case, right from the time the action was filed on 11 October 2002 that certain words complained of were defamatory in their natural and ordinary meaning. It was on that basis that the 'statement of agreed facts' and the 'agreed issues to be tried' were drawn up on 1 October 2003. An application was then made by the second and the third defendants for the two preliminary points of law to be tried which was granted by the judge. The questions were whether the statements referred to the plaintiff and whether those statements were defamatory in their natural and ordinary meaning. During the course of the case management with the benefit of the defendants' submissions, the plaintiff realised that he should amend his statement of claim in order to enhance the extrinsic fact evidence. The plaintiff had incorporated para 13 to the statement of claim by way of an amendment to show the innuendo. According to the defendants, the words allegedly defamatory in their ordinary sense must be the very words which the trial judge must construe to determine whether they were in fact defamatory. The agreed facts showed that the alleged defamation was by the use of the words pleaded taken in its ordinary and natural meaning. The authorities

showed that the trial judge should decide whether those words were defamatory without taking into account the extrinsic evidence to explain what they meant. The defendants also submitted that the averments in para 13 were not innuendoes. They could not constitute innuendoes. If they did not have special meaning to qualify as an innuendo then para 13 was nothing more than an attempt to introduce extrinsic evidence and that should not be allowed.

Held, allowing plaintiff's appeal with costs:

(1) The defendants' objection were rightly taken. In *Liberace v Daily Mirror Newspapers Ltd* [1959] The Times, June 9, 17, there was only one cause of action and no innuendo was pleaded as it was claimed that the natural and ordinary meaning of the words was clear. That must also be the stand of the plaintiff when he filed his claim on 11 October 2002. And now after hearing the submissions of the learned counsel for the defendants before the trial judge, the plaintiff wanted to amend his statement of claim by pleading innuendo and sought to introduce extrinsic facts to support that innuendo. The plaintiff should not be allowed to shift his stand to the detriment and prejudice of the defendants. Such prejudice could not be compensated by costs (see para 51).

(2) Inter alia, the grounds for seeking the amendments were varied. According to the plaintiff, the issues in controversy would be more clearly defined. The court found that the issues had been defined clearly in the 'agreed issues to be tried'. None of the amendments had made the issues in controversy clearer. In fact, the amendments had raised new facts and issues (see para 52).

(3) In regard to the argument that the proposed amendments would be able to dispose of the issues in dispute more expeditiously, the court found that far from expediting the disposal of the matter, these amendments would delay the proceedings further. It must be borne in mind that the 'Statement of Agreed Facts' and the 'Agreed Issues To Be Tried' were dated 1 October 2003, while the application to amend was filed on 5 May 2005. There was indeed an inordinate delay of one year seven months four days (*Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 4 MLJ 465) (see para 53).

(4) The court found that the proposed amendments to the statement of claim was nothing more than a tactical manoeuvre which could be construed as an abuse of the process of the court (*Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 4 MLJ 465). The proposed amendments to the statement of claim would have the effect

of nullifying mutual concessions and admissions that the parties had made in the 'statement of agreed facts' and would also render the exercise of securing the 'agreed issues to be tried' ineffectual or useless. The court also found that the proposed amendments to the statement of claim might be construed as an attempt to have a second bite at the proverbial cherry especially after having the benefit of hearing the submissions of the learned counsel for the defendants before the trial judge (see para 54).

[Bahasa Malaysia summary

Melalui satu saman dalam kamar, plaintif memohon mengikut A 20 k 5 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau bidang kuasa mahkamah yang sedia ada untuk kebenaran meminda nama defendan ketiga dengan nama-nama rakan-rakan kongsi dan mereka adalah defendan-defendan ketiga sehingga kesembilan belas dalam tindakan ini. Penolong Kanan Pendaftar yang bijaksana telah memberi kebenaran meminda dan terkilan, defendan-defendan telah memfailkan satu rayuan. Kes plaintif, dari permulaan tindakan difailkan pada 11 Oktober 2002 bahawa perkataan-perkataan yang diadukan adalah fitnah dalam maksud semulajadi dan biasanya. Berlandaskan itu 'pernyataan fakta yang dipersetujui' dan 'isu-isu yang dipersetujui untuk dibicarakan' telah dibuat pada 1 Oktober 2003. Satu permohonannya kemudiannya telah dibuat oleh defendan kedua dan ketiga atas dua isu permulaan undang-undang untuk dibicarakan yang dibenarkan oleh hakim tersebut. Soalan-soalannya ialah sama ada kenyataan tersebut merujuk kepada plaintif dan sama ada kenyataan-kenyataan tersebut adalah fitnah dalam maksud semulajadi dan biasanya. Semasa pengurusan kes dengan adanya hujahan defendan-defendan, plaintif sedar bahawa beliau sepatutnya meminda pernyataan tuntutannya untuk membolehkannya menambahkan fakta keterangan luar. Plaintif telah memasukkan ke perenggan 13 pernyataan tuntutan melalui pindaan untuk menunjukkan sindiran. Menurut defendan-defendan, perkataan-perkataan yang dikatakan memfitnah dalam maksud semulajadi mestilah perkataan-perkataan yang hakim perbicaraan harus mentafsirkan untuk memutuskan sama ada mereka sebenarnya memfitnah. Fakta-fakta yang dipersetujui menunjukkan bahawa fitnah yang dikatakan itu adalah dengan menggunakan perkataan-perkataan yang diplidkan, diambil dalam maksud semulajadi dan biasanya. Autoriti-autoriti menunjukkan bahawa hakim perbicaraan patut memutuskan sama ada perkataan-perkataan tersebut adalah memfitnah tanpa mengambil kira keterangan luar untuk menjelaskan apakah maksud mereka. Defendan-defendan juga menghujahkan bahawa kenyataan di perenggan 13 bukannya sindiran. Mereka tidak membentuk sindiran. Sekiranya mereka tidak mempunyai maksud khas untuk dijadikan sindiran, maka perenggan 13

hanyalah satu percubaan untuk mengenalkan keterangan luar dan tidak patut dibenarkan.

Diputuskan, membenarkan rayuan plaintif dengan kos:

(1) Bantahan defendan-defendan adalah patut. Di kes *Liberace v Daily Mirror Newspapers Ltd* [1959] The Times, June 9, 17, terdapat hanya satu kausa tindakan dan tiada sindiran diplidkan oleh kerana ia dinyatakan bahawa maksud semulajadi dan biasa perkataan-perkataan tersebut adalah jelas. Itu juga merupakan pendirian plaintif apabila beliau memfailkan tuntutannya pada 11 Oktober 2002. Dan sekarang selepas mendengar hujahan-hujahan peguamcara bijaksana defendan-defendan sebelum hakim perbicaraan, plaintif hendak meminda pernyataan tuntutannya dengan memplidkan sindiran dan cuba mengenalkan fakta-fakta luar untuk menyokong sindiran tersebut. Plaintif juga tidak dibenarkan menukar pendiriannya dengan menjejaskan dan memprejudiskan defendan-defendan. Prejudis sebegini tidak dapat dipampas dengan kos (lihat perenggan 51).

(2) Selain dari itu, alasan untuk meminda adalah pelbagai. Menurut plaintif, isu-isu dalam kontroversi akan lebih jelas dinyatakan. Mahkamah berpendapat bahawa isu-isu telahpun dijelaskan dengan nyata di 'isu-isu yang dipersetujui yang harus dibicarakan'. Pindaan-pindaan tersebut tidak menjadikan isu-isu dalam kontroversi lebih jelas. Sebenarnya, pindaan-pindaan tersebut membangkitkan fakta-fakta dan isu-isu baru (lihat perenggan 52).

(3) Berhubungan dengan hujahan bahawa pindaan-pindaan yang dicadangkan itu akan dapat menentukan isu-isu pertikaian dengan segera, mahkamah berpendapat bahawa jauh daripada menentukan perkara tersebut dengan segera, pindaan-pindaan ini akan melambatkan lagi prosiding tersebut. Ia harus diingati bahawa 'pernyataan fakta-fakta yang dipersetujui' dan 'isu-isu yang dipersetujui yang harus dibicarakan' bertarikh 1 Oktober 2003, sementara permohonan untuk meminda difailkan pada 5 Mei 2005. Terdapat kelewatan yang melampau selama satu tahun tujuh bulan empat hari (*Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 4 MLJ 465) (lihat perenggan 53).

(4) Mahkamah berpendapat bahawa pindaan-pindaan yang dicadangkan kepada pernyataan tuntutan adalah tidak lebih daripada satu muslihat taktik yang dapat ditafsirkan sebagai satu penyalahgunaan proses mahkamah (*Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 4 MLJ 465). Pindaan-pindaan yang dicadangkan kepada pernyataan tuntutan akan mempunyai kesan membatalkan konsesi yang dipersetujui dan perakuan pihak-pihak yang telah dibuat

di 'pernyataan fakta-fakta yang dipersetujui' dan ia juga akan menjadikan latihan memperolehi 'isu-isu yang dipersetujui yang harus dibicarakan' tidak berkesan dan tiada guna. Mahkamah juga berpendapat bahawa pindaan-pindaan yang dicadangkan kepada pernyataan tuntutan tersebut dapat ditafsirkan sebagai satu percubaan untuk kali kedua terutama sekali selepas dapat mendengar hujahan-hujahan peguamcara bijaksana defendan-defendan sebelum hakim perbicaraan (lihat perenggan 54).]

Notes

For cases on amendment of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5196–5228.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)
Capital and Counties Bank v Henty [1882] 7 App Cas 741 (refd)
Cropper v Smith [1883] 26 ChD 700 (refd)
GL Baker, Ltd v Medway Building And Supplies, Ltd [1958] 1 WLR 1216; [1958] 3 All ER 540 (refd)
Grubb v Bristol United Press Ltd [1963] 1 QB 309 (refd)
Henry Lojunin (Administrator) v Liddy Laumin & 3 Ors [1991] 3 CLJ 2161 (refd)
HK Hales v H Smiles AIR 1937 Rang 105 (refd)
Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (refd)
Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 2 SLR 310 (refd)
Katzenstein Adler Industries (1975) Ltd v Borchard Lines Ltd [1988] 138 New LJ 94 (refd)
Ketteman And Others v Hansel Properties Ltd And Others [1987] 1 AC 189 (refd)
Lee Kuan Yew v JB Jeyaretnam [1979] 1 MLJ 281 (refd)
Lee Kuan Yew v Jeyaretnam Joshua Benjamin [1990] 3 MLJ 322
Lewis v Daily Telegraph Ltd [1964] AC 234 (refd)
Liberace v Daily Mirror Newspapers Ltd [1959] The Times, June 9, 17 (folld)
Morgan v Odhams Press Ltd And Another [1971] 1 WLR 1239 (refd)
Palaniappan v Universiti Pertanian Malaysia [1995] 1 MLJ 353 (refd)
R v Horne [1777] 2 Cowp 672 (refd)
Sek Ann Thong v Tamparuli Granite Quarry (Sabah) Sdn Bhd & Anor [1996] MLJU 244 (refd)
Shahidan Shafie v Atlan Holdings Bhd & Anor & Other Appeals [2005] 3 CLJ 793; (refd)
Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649 (refd)
Sneade v Wotherton, etc [1904] 1 KB 295 (refd)
Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd [2003] 4 MLJ 465 (refd)

A *Tildesley v Harper* [1876] 10 ChD 393 (refd)
United Overseas Bank Limited v Heap Huat Rubber Co Sdn Bhd [1993] 3 CLJ 552 (refd)
Wan Daud bin Wan Jusoh v Mohamed Bin Haji Ali & Anor, Daud Bin Jusoh v Annuar Bin Haji Musa & Anor, Mohd Nor Bin Ismail v Mohd Zain bin
B *Abdullah & Anor* [1988] 2 MLJ 384 (refd)
Warner v Sampson [1959] 1 QB 297 (refd)
Wong Ah Hee @ Wong Ah Mooi & Anor v Low Tuck Hoong [1993] MLJU 183 (refd)

C **Legislation referred to**
Companies Act 1965 s 129(6)
Rules of the High Court 1980 O 14A, O 20 rr 5, 8, O 25, O 34

Lim Kian Leong (Sia Siew Mun with him) (Lim Kian Leong & Co) for the
D *plaintiff.*
Yee Mei Ken (Shearn Delamore & Co) for the first defendant.
Raja Abdul Aziz Addruse (Kumar Kanagasingam & Gobinath Karuppan with him) (Lee Hishamuddin Allen & Gledhill) for the second to the nineteenth defendants.

E **Abdul Malik IshakJ (now JCA):**

INTRODUCTION

F **[1]** By way of a summons in chambers in encl 30, the plaintiff sought pursuant to O 20 r 5 of the Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the court for the following prayers before the learned senior assistant registrar ('SAR'):

G (i) The plaintiff be given leave to substitute the third defendant with the names of the partners, namely Aznam Dato' Mansor, Ben Chan Chong Choon, Chia Loong Thye, DP Naban, Gan Khong Aik, Iain Sedgley, Lambert Rasa-Ratnam, Lim Lee, Muthanna Abdullah, Ng Leong Huat, Nitin V Nadkarni, Sanjay Mohanasundram, Tai Foong Lam, Thomas
H M.L. Lee, Vincent Chan Siew Onn, Wong Kian Kheong and Woo So Yin, as the 3rd to 19th defendants to the present action.

(ii) The plaintiff be given liberty to amend the writ of summons and statement of claim as per annexure 'A' herein.

I (iii) The service of the amended writ of summons and amended statement of claim upon the solicitors of the 2nd to 19th defendants, Messrs Lee Hishammuddin Allen & Gledhill shall be deemed as if the amended writ of summons and statement of claim has been served on each of the defendants individually.

(iv) The defendants be given liberty to reply to the amended statement of claim within eight days from the service of the amended statement of claim.

(v) Costs in the cause;

(vi) Such further and/or (other) relief as this honourable court deems fit and just.

[2] The grounds in support of the application in encl 30 were set out as follows:

(i) Aznam Dato' Mansor, Ben Chan Chong Choon, Chia Loong Thye, DP Naban, Gan Khong Aik, lain Sedgley, Lambert Rasa-Ratnam, Lim Lee, Muthanna Abdullah, Ng Leong Huat, Nitin V Nadkarni, Sanjay Mohanasundram, Tai Foong Lam, Thomas ML Lee, Vincent Chan Siew Onn, Wong Kian Kheong and Woo So Yin together with the second defendant, at all material times, were the partners of Messrs Lee Hishammuddin.

(ii) Messrs Lee Hishammuddin has since merged with Messrs Allen & Gledhill and is now known as Messrs Lee Hishammuddin Allen & Gledhill.

(iii) Those who were partners of Messrs Lee Hishammuddin at the material time can be identified immediately if they were named as the parties to the action instead of the name of the partnership.

(iv) The amendments would enable the nature and meaning of the defamatory statements complained of by the plaintiff to be stated with greater clarity.

(v) The amendments would enable the real questions in controversy between the parties to be decided.

(vi) The amendments would enable a speedy and more expedient trial.

[3] The learned SAR gave leave to amend and being aggrieved the first defendant by the name of Tan Kim Hor filed an appeal to the judge in chambers as reflected in encl 39. The second to the nineteen defendants were also aggrieved and they filed an appeal to the judge in chambers as seen in encl 38.

THE LEGAL SEMANTICS

[4] So long as the amendments will not cause any injustice to the parties, the courts have been magnanimous enough to allow it. But the amendments

will always be based on three basic preliminary questions:

(i) whether the application was filed bona fide?;

(ii) whether the prejudice caused to the other side can readily be compensated by costs?; and

(iii) whether the amendments would not, in effect, turn the suit from one character into a suit of another and inconsistent character?

[5] Both rr 5 and 8 of O 20 of the RHC should be read together and when so read they confer upon the court a general power to allow or order amendments to be made. Rule 5 of O 20 of the RHC deals particularly with the power of the court to allow the writ or any pleading to be amended. While r 8(1) of O 20 of the RHC deals generally with the power of the court to order any document, other than a judgment or order as envisaged in r 8(2) of O 20 of the RHC, to be amended. Rule 8(1) of O 20 of the RHC throws the net wider as it would apply to writs and pleadings as well as other documents. Rule 5 of O 20 of the RHC reads as follows:

5. Amendment of writ or pleading with leave (O 20 r 5)

(1) Subject to O 15 rr 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the court for leave to make the amendment mentioned in paras (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under para (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under para (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under para (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

And r 8 of O 20 of the RHC states as follows:

8. Amendment of certain other documents (O 20 r 8)

(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) This rule shall not have effect in relation to a judgment or order.

[6] It is trite law that an amendment, when allowed, takes effect not from the date when the amendment is made but rather from the date of the original writ which it amends and to every successive amendment of whatever nature and at whatever stage the amendment is made. Put differently, when an amendment is made to the writ, that amendment dates back to the date of the original issue of the writ and the action continues as though the amendment had been inserted from the very beginning. In the words of Collins MR in *Sneade v Wotherton* [1904] 1 KB 295, at p 297:

> the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed

[7] And, 'once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried' (per Hodson LJ in *Warner v Sampson* [1959] 1 QB 297, at p 321). Of significance would be this. That an amendment to correct the name of a party relates back to the date of the issue of the writ, even after the expiry of the limitation period (*Katzenstein Adler Industries (1975) Ltd v Borchard Lines Ltd* [1988] 138 New LJ 94).

[8] Certain basic principles must be re-stated as it would allow a better understanding of the law:

(a) It would cause a grave injustice to the plaintiff if the defendant is allowed to introduce for the very first time on appeal evidence which

in good faith, leave ought to be given to the applicant, see *Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353.

(g) The court may at any stage of the proceedings allow any party to amend his pleadings on such terms as may be just (*United Overseas Bank Limited v Heap Huat Rubber Co Sdn Bhd* [1993] 3 CLJ 552).

(h) Order 20 r 5(5) of the RHC allows an amendment to the pleadings where a new cause of action is added or substituted provided that the new cause of action arises from the same facts or substantially from the same facts as the cause of action in respect of which relief has already been claimed.

(i) The court will always act prudently and in determining whether an amendment ought to be allowed, the court will take into consideration two very important factors:

(1) whether the new cause of action arises out of the same facts or substantially the same facts in respect of which relief has already been claimed by the party; and

(2) whether it is just to allow the amendment bearing in mind the bigger picture of whether the amendment will cause any injustice to the other party.

(j) Even if the party opposing the amendment would be deprived of an accrued right of limitation that by itself would not make it unjust to give leave to amend. It is only one of the factors that will be taken into account.

[9] It is certainly an impossible exercise to itemise the circumstances where amendments would be allowed. Everything depends on the facts of the case.

THE PROPOSED AMENDMENTS

[10] Now, the amendments to the writ of summons and the statement of claim proposed by the plaintiff can be seen in annexure 'A' annexed to encl 30. It substituted the third defendant with the names of the partners and they would be the third to the ninteenth defendants to the present action before this court. The names of these partners have already been stated earlier and there is no necessity to repeat them again.

[11] The proposed amendments to the statement of claim were confined to paras 3, 4, 5, 7, 8, 9, 10, 11, 12, and 13. While the old para 8 was deleted and re-numbered as para 12 and a new paragraph 8 was incorporated. The old para 9 too was deleted and re-numbered as para 14 and a new para 9 was incorporated. The previous contents of the old para 9 was retained and given

had been readily available at the hearing but was not produced. And when the court of the first instance is in no position to grant an application to amend the defence and the counterclaim, it would be wrong for the appellate court to allow such an amendment when it is about to hear the appeal, see *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (SC).

(b) Any proposed amendment must not embarrass, prejudice or cause any injustice to the other party and must not be for the purpose of changing, altering or introducing any new cause of action (*Wan Daud bin Wan Jusoh v Mohamed bin Haji Ali & Anor, Daud Bin Jusoh v Annuar bin Haji Musa & Anor, Mohd Nor bin Ismail v Mohd Zain bin Abdullah & Anor* [1988] 2 MLJ 384).

(c) The plaintiff who applies for an amendment under the RHC must satisfy the court that his application comes within the ambit of rules 5(3), 5(4) and 5(5) of O 20 of the RHC (*Henry Lojunin (Administrator) v Liddy Laumin & 3 Ors* [1991] 3 CLJ 2161).

(d) That the court has the power under the rule to grant an amendment after the expiry of the limitation period notwithstanding the fact that the effect of such an amendment will be to add or substitute a new cause of action subject always to the very important caveat, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed (*Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 (SC)).

(e) No matter how late the amendment is sought to be made, whether before or at or after the trial or even after judgment or after an appeal, it should be allowed provided it will not cause the opposite party to incur some injury or be prejudiced which cannot be compensated for by costs or otherwise. It must be borne in mind that the court may in its discretion allow the amendment if such an amendment does not add a new cause of action. It is also prudent to note that the court shall not allow an amendment if such an amendment seeks to convert the claim into an inconsistent claim of a different nature (*Sek Ann Thong v Tamparuli Granite Quarry (Sabah) Sdn Bhd & Anor* [1996] MLJU 244).

(f) The rule confers on the court a wide discretion to allow an amendment, be it by the plaintiff or the defendant, and the court will allow such an amendment at any stage of the proceedings if such an amendment is necessary in order to do justice. Leave to amend the pleadings may be given even at the stage of the hearing provided that the defendant can be compensated by costs. And where the amendment does not amount to a new cause of action which is statute barred and where it does not cause an injustice to the other party and it appears to have been made

a new number in the form of para 14. The old para 10 was re-numbered as para 15 and the contents retained. This re-numbering continued further. Thus, the old para 11 was re-numbered as para 16 and the contents retained. The old para 12 was re-numbered as para 17 and the contents retained. The old para 13 was re-numbered as para 18 and the contents retained. The old para 14 was re-numbered as para 19 and the contents retained. The old para 15 was re-numbered as para 20 and the contents retained. The old para 16 was re-numbered as para 21 and the contents retained. The old para 17 was re-numbered as para 22 and the contents retained. The old para 18 was re-numbered as para 23 and the contents retained. The old para 19 was re-numbered as para 24 and the contents retained. The old para 20 was re-numbered as para 25 and the contents retained. The old para 21 was re-numbered as para 26 and the contents retained. The old para 22 was re-numbered as para 27 and the contents retained. Finally, the old para 23 was re-numbered as para 28 and the contents retained.

[12] The crucial proposed amendments to the statement of claim can be seen in paras 3, 4, 5, 7, 8, 9, 10, 11, 12, and 13 and I would now reproduce them. The highlighted and bold portions would be the proposed amendments:

3. The second defendant **was at all material times an advocate and solicitor who practised as a partner under the name and style of Lee Hishammuddin** ~~is a partner of the third defendant~~ and is an individual of full age with an address for service at Level 16, Menara Asia Life, No. 189, Jalan Tun Razak, 50400 Kuala Lumpur.

4. The third — ninteenth defendants, at all material times, were partners of the second defendant and practised under the name and style of Lee Hishammuddin ('the Firm'). ~~is a firm of advocates and solicitors which~~ The Firm represented the first defendant in respect of the issue of his re-election as a director of APM Automotive Holdings Bhd, with an address for service at Level 16, Menara ~~Phileo~~ Asia Life, No. 189, Jalan Tun Razak, 50400 Kuala Lumpur.

5. On or about 29 May 2002, the second defendant falsely and/or maliciously made statements on behalf of himself, the first defendant and the ~~third defendant~~ **Firm** which bore defamatory imputations against the plaintiff to the press which consequently led to their publication, inter alia, in 'THE STAR' on 30 May 2002 and 'NEWS STRAITS TIMES' on 2 June 2002.

7. The Offending Statements were made immediately to the press that was awaiting outside the function room after the Annual General Meeting of APM Automotive Holdings Bhd's Annual General Meeting on 29 May 2002 ['the said AGM'] which was chaired by the plaintiff. Press

articles prior to the said AGM have already identified the plaintiff as Chairman of APM Automotive Holdings Bhd. At the said AGM, the first defendant failed to be re-elected as a director.

8. The second defendant obviously intended, authorized, anticipated and/or wished that his statements would be published.

9. By the time the second defendant made the press statement, there was already much publicity on the first defendant and his family's quest to wind-up Tan Chong Consolidated Sdn Bhd, and their allegations against the plaintiff and his family being the cause of the 'breakdown of mutual trust'.

10. Some of the press articles bore inflammatory headings such as:

(i) Fireworks expected at AGM — Speculation over position of Tan Chong Motor co-founder.

[The New Straits Times Business on 28 May 2002].

(ii) Tan Chong Board tussle on the cards.

[The Star on 23 May 2002].

The press articles also characterized the 'dispute' as between factions led by the first defendant and his nephew, the plaintiff.

11. The second defendant's Offending Statements referred and were understood to refer to the plaintiff as the plaintiff was the Chairman of the said AGM.

12. **12.** The natural and ordinary meaning and/or the ordinary inferences **of the Offending Statements is** ~~in light of the known fact that the plaintiff was the Chairman of the said AGM~~ is that:

(i) the plaintiff did not discharge the role as Chairman properly or legitimately;

(ii) the plaintiff has conducted the re-election process in an improper **and illegitimate** manner and ~~the improper~~ **such** conduct resulted in the first defendant's failure to be re-elected.

13. Further, by way of innuendo the Offending Statements meant and were understood to mean that:

(i) The plaintiff did not chair the APM resolution to re-elect the first defendant as a Director of the APM Board fairly, properly, legitimately and/or honourably;

(ii) the plaintiff has resorted to unfair, improper, illegitimate and/or

dishonourable means to ensure the removal of the first defendant from the APM Board of Directors;

(iii) the plaintiff premeditated the ouster of the first defendant from the APM Board of Directors;

(iv) the plaintiff planned for the removal of the first defendant regardless of the outcome of the APM resolution;

(v) the plaintiff charaded the APM resolution to disguise his ulterior objective to oust the first defendant from the management of APM.

THE ARGUMENTS OF THE PARTIES AND THE LAW

[13] I was referred to the case of *Hock Hua Bank Bhd v Leong Yew Chin*. According to Mr Lim Kian Leong, the learned counsel for the plaintiff, that the Supreme Court in that case — referring to the Hock Hua Bank, had applied a liberal approach in allowing an amendment to the statement of claim after the expiry of the limitation period notwithstanding that it added a new cause of action subject to the very important condition and that would be that it arose from the same or substantially the same set of facts. He said that there is an important philosophy behind such magnanimous gesture of the Supreme Court and that would be that the court would not be bound by technical limitations but rather by the desire that the real issues should be brought before the court for resolution and, most importantly, he said that leave to amend should be given even at the advanced stage of the proceeding. He said that the amendment that was sought for in *Hock Hua Bank* was to introduce a new cause of action even though it was time barred. According to him that that case showed the liberal attitude of the Supreme Court in setting out the perimeters for an amendment provided the defendant there can be compensated by costs.

[14] Jenkins LJ in *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 WLR 1216 at p 1231, [1958] 3 All ER 540 at p 546 was of the view that all amendments ought to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings.' Bowen LJ in *Cropper v Smith* [1883] 26 ChD 700, at pp 710–722 observed that:

> It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ……. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace

> ……. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right

[15] Bramwell LJ in *Tildesley v Harper* [1876] 10 ChD 393 at pp 396, 397 aptly said:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise

[16] But, not all amendments are allowed by the court. The court will refuse leave to allow an amendment if it results in prejudice or injury to the other party which cannot be properly compensated for by costs. The court too will have regard, in considering any amendment, as to any undue delay or whether the application is made mala fide or whether such an amendment will in any way unfairly prejudice the other party.

[17] Again, I was referred to the case of *Shahidan Shafie v Atlan Holdings Bhd & Anor & Other Appeals* [2005] MLJU 279 (CA) and I was asked to dutifully follow that case and allow the proposed amendments. That case — referring to Shahidan Shafie, showed the liberal approach adopted by the Court of Appeal in regard to an amendment. Briefly, in that case the plaintiff filed the originating summons and it was struck out by the High Court judge because it disclosed no cause of action. On appeal, the Court of Appeal held that the judge was correct to strike out the originating summons based on the pleadings. At p 808 of the report, Gopal Sri Ram JCA writing for the Court of Appeal had this to say:

> Now for the last point. Although he did not pursue it with any vigour or enthusiasm in his oral argument, Mr Thomas has in his written submission suggested that it would be wrong for us at the appellate level to see if the plaintiff's summons can be saved by amendment. With respect I cannot agree for two reasons. In the first place, we as the Court of Appeal are by virtue of r 76 of the Rules of the Court of Appeal, vested with all the powers exercisable by the court of first instance, in this case the High Court. It is axiomatic therefore that since the High Court has ample power to permit an amendment, we too enjoy the like power. In the second place, we have said it often enough that we will not permit a litigant to suffer for the mistakes of his lawyers where to correct the error will not produce injustice to the other side. Now, this is a case where by permitting the plaintiff to amend his summons, the defendants will suffer no prejudice or harm that cannot be remedied by a suitable order as to costs. They will still have their day in court. And they might even succeed again. But consider for a moment the plaintiff's position. He will forever be shut out from his chance at receiving justice. Therefore weighing these two opposing factors on a balance I find the tilt to be in

A the plaintiff's favour. The suggestion that the court is here rushing to the assistance of the plaintiff is completely misconceived. All that we are doing is meting out justice according to the substantial merits of the case without regard to technicalities. And that, I think, is why we exist as a constitutional institution

B And what his Lordship said demonstrated and illustrated how far the appellate courts would allow the pleadings to be amended. Even after the originating summons has been struck out, the amendment to the pleading was allowed and costs was given.

C **[18]** Here, before me, it was argued that the amendments were aimed to put before the court an alternative argument of an innuendo but the prayers remained unchanged. That would be and it constituted prayer (ii) to encl 30. The first amendment that was sought as per prayer (i) of encl 30 related to the additional parties being added. It was submitted that the defendants here D contested prayer (ii) of encl 30. It was submitted that during the course of the case management before Abdul Wahab Patail J, it became apparent that the plaintiff should identify the extrinsic facts in order to pursue the plaintiff's case with some measure of clarity. The plaintiff had originally pleaded that the offending statements were, inter alia, defamatory of the plaintiff in their E natural and ordinary meaning. This can be seen, according to the learned counsel for the plaintiff, at the original para 8 of the statement of claim. It was submitted that during the course of the case management with the benefit of the defendants' submissions, the plaintiff realised that he should amend his statement of claim in order to enhance the extrinsic fact evidence. F It was submitted that the plaintiff has incorporated para 13 to the statement of claim by way of an amendment to show the innuendo. It was said that the plaintiff has got to plead innuendo properly. It was argued that based on the principles on amendments especially after taking into account the case of Hock Hua Bank which propagated the liberal approach, the proposed G amendments merely sought to clarify the extrinsic facts surrounding the allegation focussing on why those facts would assist the court in deciding whether the statements made were defamatory of the plaintiff and to state clearly that the allegation of defamation was not just words used in their natural and ordinary meaning defamatory but that by way of an innuendo H the words were meant to be defamatory of the plaintiff. It was said that the amendments sought were well within the perimeters of the Hock Hua Bank and Shahidan Shafie situations. It was not time barred. The statements were made at an Annual General Meeting ('AGM') particularly after the AGM on 29 May 2002 (see para 7 of the proposed amendment to the statement of I claim). While the bulk of the other amendments were merely to show the innuendo (see para 10 of the proposed amendment to the statement of claim). Such amendments were well within the knowledge of those people attending the AGM and who would have heard the words being uttered after the AGM. It was submitted that without the proposed amendments the

innuendoes cannot be made. It was said that the proposed amendments arose out of the same events that was pleaded in the original statement of claim. It was merely to substantiate the innuendoes. It was re-emphasised that the matter was still at the case management stage. For all these reasons, the learned counsel for the plaintiff prayed that the appeals in encls 38 and 39 be dismissed with costs to be given to the defendants in any event.

[19] Raja Abdul Aziz Addruse for the second to the nineteenth defendants responded. He submitted that the learned counsel for the plaintiff misunderstood the underlying principle of *Hock Hua Bank*. According to him, the question of time bar was not relevant to the defendants. Bona fide, according to him, was an important ingredient. He pointed out that the present case at hand was based on defamatory statements being uttered. He asked, 'what were the allegations originally pleaded to allege that the words were defamatory?' According to him, based on the strength of the original text of the statement of claim as reflected at para 12 of encl 30, Abdul Wahab Patail J, divided the preliminary questions into two, namely:

(a) whether the words uttered were defamatory?; and

(b) if they were, whether they referred to the plaintiff?

[20] Raja Abdul Aziz Addruse implored me to look at the facts of the case. He then asked me to ponder the next question, viz, whether the amendments were necessary? He then referred me to the case of *Wong Ah Hee @ Wong Ah Mooi & Anor v Low Tuck Hoong* [1993] MLJU 183 where I said:

> It was further urged upon me that the learned Magistrate had failed to consider the materiality and effectiveness of the amendments in the context of its usefulness. Now, on this score, I need only cite the case of *Ponnusamy v Nathu Ram* [1959] MLJ 228 where Good J said that in an application to amend the pleadings, the court should consider the materiality and the effectiveness of the amendment, and that it was a well established practice not to allow an amendment where it appeared that such an amendment would be useless. It was further held that the court should look at the probable consequences of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made.

[21] Raja Abdul Aziz Addruse submitted that we have to look at the way the courts have looked at the construction of the defamatory words. He then referred me to a book entitled '*Gatley On Libel And Slander*' (8th Ed) by Philip Lewis, particularly to p 1312 at paras 1311 and 1312 where the learned author wrote:

> 1311. Natural and ordinary meaning. Where the plaintiff relies on the natural and ordinary meaning of the words complained of, no evidence is admissible of their meaning or the sense in which they were understood (*Slim v Daily Telegraph* [1968] 2 QB at p 173, per Diplock LJ) or of any facts giving rise to any inferences to be

drawn from the words used (*Tolley v Fry* [1931] AC 333; *Holdsworth v Associated Newspapers* [1937] 53 TLR 1029; *Bowles v Truth (NZ) Ltd* [1965] NZLR 768), for it is for the jury to determine the sense in which the words would reasonably have been understood by an ordinary man in the light of generally known facts and meanings of words. For instance, evidence of the meaning of a slang expression which has passed into common use would not be admissible (per Pollock CB in *Barnett v Allen* [1858] 3 H & N at p 379).

1312. Context. But the plaintiff may, to explain the meaning of a libel, put in evidence any document which forms part of its context. For instance, he may put in evidence, where the libel is contained in a letter, a previous letter which is referred to in the letter complained of (*White v Bourguin* [1917] 204 III App R 83)

[22] So, according to Raja Abdul Aziz Addruse, the words allegedly defamatory in their ordinary sense must be the very words which the trial judge must construe to determine whether they are in fact defamatory. According to him, the agreed facts as reflected at para 11 of encl 21 showed that the alleged defamation was by the use of the words pleaded taken in its ordinary and natural meaning. According to him, the authorities showed that the trial judge should decide whether those words were defamatory without taking into account the extrinsic evidence to explain what they meant.

[23] Raja Abdul Aziz Addruse further submitted that the learned counsel for the plaintiff said that the purpose of the proposed amendments was to adduce extrinsic facts in order to pursue the case with clarity which would in turn assist the court in deciding whether the words used were defamatory and whether the defamatory words were not only used in their ordinary meaning but also by way of an innuendo.

[24] According to Raja Abdul Aziz Addruse, as far as the ordinary meaning was concerned the position has crystallised in that an amendment should not be allowed to depart from what has earlier been agreed upon. In regard to the alleged innuendoes, he has this to say:

(a) that the proposed amendments were only thought of after he had completed his submissions before Abdul Wahab Patail J, on the agreed preliminary issue and it was for this reason that the question of bona fide became a relevant issue; and

(b) that the question of an innuendo as reflected at para 13 of encl 30 must be viewed in this light — that innuendoes are words which have a very special meaning, and he proceeded to give two examples:

(i) 'He's a gay' — that has a special meaning to it. By innuendo, it doesn't mean that he's a married person. He is something else.

(ii) A light fingered person is a pick pocket. That is an innuendo.

[25] According to Raja Abdul Aziz Addruse the averments in para 13 of encl 30 are not innuendoes. They cannot constitute innuendoes. He submitted that if they do not have special meaning to qualify as an innuendo then para 13 of encl 30 is nothing more than an attempt to introduce extrinsic evidence and that should not be allowed.

[26] In regard to *Shahidan Shafie*, Raja Abdul Aziz Addruse has this to say. That case concerned an application to strike out and the principle that was laid down was nothing more than that the court if it decided not to strike out the pleading for some defect or otherwise would nevertheless permit an amendment to be made. He said, that case did not add anything new to what had been set out in *Hock Hua Bank*. For these reasons, he submitted that the appeals in encls 38 and 39 should be allowed with costs.

[27] Mr Yee Mei Ken, the learned counsel for the first defendant, submitted along the following lines. He distinguished Hock Hua Bank by stating that, that case was a majority decision. It was in relation to a banking claim and that the amendment application was made to add two new causes of action after the limitation period, namely, in respect of conversion and money had and received. According to him the amendment application in Hock Hua Bank was made at the summons for directions stage pursuant to O 25 of the RHC. This was the stage of the proceedings to seek directions and to set the matter down for trial. In sharp contrast, he submitted that the present case at hand concerned a libel action and that the parties have gone past the stage of summons for directions. According to him, Abdul Wahab Patail J, had given his directions under O 34 of the RHC during the case management on 25 August 2003 for the parties to file the agreed bundle of documents, the statement of agreed facts, and the statement of agreed issues to be tried. According to him, these directions were duly complied with on 1 October 2003. He also pointed out that the case management directions were complied with on the basis of the original pleadings. According to him, the agreed facts and the agreed issues to be tried were arrived at and conceded by counsel on all sides bearing in mind that the trial of the preliminary issues were foremost in the minds of the parties. He emphasized that on 13 October 2004, the learned counsel for the defendants filed the O 14A application for trial of the following preliminary issues:

(a) Whether the spoken words of the second defendant on behalf of the first defendant as set out in para 11 of the statement of agreed facts in encl 21 refer to the plaintiff?

(b) If so, whether those spoken words are defamatory of the plaintiff?

And, according to him, the hearing proceeded before Abdul Wahab Patail J, and it was part heard. According to him it was the plaintiff's counsel's turn

to make his submission. In the later part of this judgment, I will reproduce the spoken words of the second defendant spoken on behalf of the first defendant.

[28] Mr Yee Mei Ken continued with his submissions along the following lines. That the principles governing an amendment application are well settled. The majority decision in *Hock Hua Bank* allowed the amendment application based on the facts of that case. That *Hock Hua Bank* has not expounded any new legal principles with regard to amendments.

[29] It was the stand of the first defendant that the plaintiff's amendment application was merely a tactical ploy to rescue his claim based on an after thought. It was taken out solely to undermine and frustrate the pending application for trial of the preliminary issues under O 14A of the RHC. That being the case, it was said that constituted an abuse of the process of the court.

[30] It was further submitted on behalf of the first defendant that the amendment application was not filed on a bona fide basis and it was done in order to turn the suit from one character to that of another character and it prejudiced the first defendant to such an extent that it cannot be compensated by costs. Of crucial importance was this. That there has been an undue and inordinate delay of two years and four months before the plaintiff filed his amendment application. For these reasons, the learned counsel for the first defendant urged this court to allow the appeal in encl 39 with costs.

FACTS OF THE CASE

[31] It would not be out of place to narrate the facts of the case. In fact, the facts have been agreed upon by the parties (see encl 21). On 29 May 2002, an AGM of APM Automotive Holdings Berhad was held. The AGM was chaired by the plaintiff. One of the resolutions scheduled to be raised at the AGM was the resolution to re-appoint the first defendant as a director of APM Automotive Holdings Berhad pursuant to s 129(6) of the Companies Act 1965 ('the Resolution'). The following matters occurred at the AGM. The meeting was informed that the first defendant, who was over the age of 70 years, sought re-appointment as a director under s 129(6) of the Companies Act 1965. The second defendant who was a proxy asked whether the Board of Directors thought that the first defendant was suitable for recommendation to be re-appointed as a director. Dato' Sadasivan, an independent director of the company, responded and he said that in coming to the decision to recommend the first defendant for re-appointment, the directors took into account all the relevant factors including his past

contributions and his ability to act as a director of the company. However, the said Dato' said that the final decisions rested with the shareholders.

[32] The second defendant then congratulated the Board of Directors for its independence in coming to the decision and expressed his views that every respect should be accorded to the first defendant as a founding member and that family dispute should not be permitted to intrude into the Boardroom. In response to the second defendant's remark that it was inconceivable that the recommendation of the first defendant should be debated upon but rather that as a founding member, his recommendation should be as a matter of course, Mr SC Khoo, the executive director, responded by saying that under the code of corporate governance, the appointment of every director had to be evaluated.

[33] Other shareholders expressed their views as to why the first defendant should be re-appointed as a director. The resolution was proposed by Mr William Woon and seconded by Mr Zulkifli Hussain and thereafter the Resolution was put to a vote by a show of hands. The Resolution reads as follows:

> Resolved that pursuant to s 129(6) of the Companies Act 1965, Dato' Tan Kim Hor be and is hereby re-appointed as a director of the company and to hold office until the next AGM

[34] On the show of hands, there were 64 shareholders voting in person or by proxy who were in favour of the Resolution and six shareholders/proxies who were against the Resolution. Mr Low Kok Meng, a proxy, raised his hand, stood up and proceeded to the microphone. The plaintiff, as the chairman of the AGM, declared that on the show of hands the Resolution was carried. Mr Low Kok Meng, who was at the microphone, demanded for a poll. The second defendant and Mr. Michael Lim, a proxy, both objected to the poll on the grounds that the poll was demanded after the declaration by the chairman and that the Resolution had been carried on the basis of the wordings of art 61 of the Articles of Association of the company. The second defendant and Mr Michael Lim said that the demand for a poll came too late because it had to be demanded before the declaration of the results of the chairman due to the words 'before the declaration of the results of the show of hands' and given that the declaration by the chairman was conclusive in view of the words in the concluding paragraph of art 61.

[35] The plaintiff ruled that a poll be taken. Later that afternoon, the plaintiff announced that 61% of the votes had been cast not in favour of the Resolution. Accordingly, the first defendant was not re-elected as a director.

[36] Immediately after the announcement of the results of the poll taken at the AGM on 29 May 2002, the following words were spoken by the second defendant on behalf of the first defendant to the press (these spoken words can be seen at para 11 of the statement of agreed facts in encl 21 and they were said to be defamatory of the plaintiff):

> We believe the poll result of APM was a contestable process.
>
> The surviving co-founder of Tan Chong has a good case to remain on the Board of APM.
>
> My client and I are examining all our available options and will be coming up with a decision pretty soon.
>
> Overall, the meetings have been carried out in a proper manner except for the APM resolution.

Hereinafter, the spoken words as alluded to above will be referred to as 'the statements'.

THE 'AGREED ISSUES TO BE TRIED'

[37] The parties prepared the 'agreed issues to be tried' dated 1 October 2003 as seen in encl 22. They were couched in these words:

(a) Whether the statements in para 11 of encl 21 refer to the plaintiff?

(b) If so, whether the statements are defamatory of the plaintiff?

(c) Whether the statements bore the meaning that:

> 'there are reasonable grounds for contending that the holding of a poll on the Resolution was not proper and/or was open to legitimate challenge and that as a result the first defendant had failed to secure re-election to the board of APM?'

(d) Whether the defence of justification is available to the defendants?

(e) Whether the statements were fair comment on a matter of public interest?

(f) Whether the statements were made falsely and/or maliciously?

(g) What loss and damage, if any, the plaintiff has suffered as a result of the statements?

(h) Whether the plaintiff is entitled to aggravated damages, and if so, how much?

(i) Whether the first defendant, second defendant and/or the third defendant are liable for the plaintiff's such loss and damage as may

be found under paras (g) and (h) above?

ANALYSIS

[38] It has always been the plaintiff's case, right from the time that this action was filed on 11 October 2002 that the words complained of were defamatory in their natural and ordinary meaning as seen in the old paragraph 8 of the statement of claim. It was on that basis that the 'Statement of Agreed Facts' and the 'Agreed Issues To Be Tried' were drawn up on 1 October 2003 (see encls 21 and 22 respectively). An application was then made by the second and the third defendants for the two preliminary points of law to be tried and this was granted by Abdul Wahab Patail J. The questions were whether the statements referred to the plaintiff and whether those statements were defamatory in their natural and ordinary meaning. On 13 October 2004, Abdul Wahab Patail J, heard submissions made on behalf of the second and the third defendants (this can be seen from the notes of proceedings dated 13 October 2004). During the course of his submission in reply, the learned counsel for the plaintiff asked for a short adjournment because he wanted to introduce further extrinsic evidence to explain the meaning of the statements and to plead innuendoes.

[39] The position taken by the defendants on the introduction of extrinsic evidence can be seen in the notes of proceedings dated 13 October 2004. It is an established law that the question whether the statements complained of are capable of conveying a defamatory meaning is entirely a question of law and it is for the court alone to decide. In *Morgan v Odhams Press Ltd & Anor* [1971] 1 WLR 1239, Lord Reid writing a separate judgment for the Privy Council aptly said at pp 1242–1243:

> The next protection for the defendant is that at the end of the plaintiff's case the judge may be called upon to rule whether the words complained of are capable of referring to the plaintiff in light of the special facts or knowledge proved in evidence. The main question in this case is–how is he to make that decision? It is often said that because a question is for the judge to answer it must be a question of law. I have more than once stated my view that the meaning of words is not a question of law in the true sense, even in other departments of the law where a much stricter test of the meaning of words is adopted than in the law of libel. It is simply a question which our law reserves for the judge

[40] In determining the natural and ordinary meaning of the words, the sense or meaning intended by the person uttering the words or in which the person complaining understands it, is irrelevant; and extrinsic evidence is not admissible in construing the words. In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, LP Thean J, writing for the Court of Appeal of Singapore succinctly said at pp 318–319:

Natural and ordinary meaning of the words

We now consider these issues seriatim. In determining the natural and ordinary meaning of the words complained of, the sense or meaning intended by the appellant is irrelevant. Nor for such purpose is the sense or meaning in which the words were understood by the respondent relevant. Nor is extrinsic evidence admissible in construing the words. The meaning must be gathered from the words themselves and in the context of the entire speech made by the appellant on that occasion. It is the natural and ordinary meaning as understood by reasonable members of the audience at the Bedok car park on that evening using their general knowledge and common sense. Such meaning is not confined to a literal or strict meaning of the words, but includes any inferences or implications which could reasonably be drawn by such persons: see para 4.04 of Duncan and Neill on *Defamation* (2nd Ed). The learned judge, in construing the words, said, at p 328:

> The meaning to be elicited from it which this court as a decider of fact has to ascertain involves a process of construction which, in some ways, is peculiar to the law of defamation. So far as it is a question of fact, it does not involve the acuity of a lawyer in the construction of legal or commercial documents nor the imperviousness of a simpleton. The aim and object of the whole process of eliciting the meaning of the speech is to find out what an ordinary fair-minded person in Singapore who was in the audience that night and using his general knowledge and commonsense would understand by the words spoken in the context and according to the tone and mode of delivery.

In our opinion, the learned judge has adopted the correct approach in determining the natural and ordinary meaning of the words. He has also, as evident from the later part of his judgment (on p 329), excluded or disregarded as irrelevant the sense in which the words were intended by the appellant or understood by the respondent, and appreciated that a minute linguistic analysis of the words or phrases used is unlikely to reflect the impression formed by reasonable members of the audience.

[41] As for the innuendoes, the approach by the courts has been to strike out the innuendoes introduced for the purpose of 'ascribing too stained a meaning' to the alleged offending words or to the statements. In *Grubb v Bristol United Press Ltd* [1963] 1 QB 309, Holroyd Pearce LJ writing a separate judgment for the Court of Appeal said at pp 326–327:

> In my judgment, the strong body of authority which has been cited leads to the conclusion that any innuendo (that is, any allegation that the words were used in a defamatory sense other than their ordinary meaning) cannot rely on a mere interpretation of the words of the libel itself but must be supported by extrinsic facts or matters. Thus, there is one cause of action for the libel itself, based on whatever imputations or implications can reasonably be derived from the words themselves, and there is another different cause of action, namely, the innuendo, based not merely on a libel itself but on an extended meaning created by a conjunction of the words with something outside them. The latter cause of action cannot come into existence unless there is some extrinsic fact to create the extended

meaning. This view is simple and accords with common sense. Unless, therefore, the alleged innuendo has the support of such a fact, it cannot go to the jury, and in the interlocutory stages of the action it may be struck out. In so far as *Loughan*'s case [1962] 2 WLR 692; [1962] 1 ALL ER 404, C.A. contains any observations to the contrary, I am unable to adopt them, in view of the authorities cited to us.

And Davies LJ in the same case — referring to *Grubb*, defined innuendo in this way (see pp 336–337 of the report):

The word 'innuendo' is used in at least two meanings in the law of defamation. First, it is applied to facts and matters tending to show that the alleged libel or slander — between which, for the purposes of this judgment, there is no difference — refers to the plaintiff. Second, it is applied to a secondary or extended or expanded meaning of the alleged libel, as based upon and proved by the existence of extrinsic facts and matters.

Of these usages, only the second is, in my view, strictly accurate.

It is, of course, necessary in every case for the plaintiff to allege and prove that the libel was understood to refer to him. The averment necessary to establish this is frequently referred to as an innuendo: see Fraser on *Libel and Slander*, (7th Ed 1936), p 18; Gatley on *Libel and Slander*, (5th Ed 1960), p 449; *Halsbury's Laws of England*, 3rd Ed, Vol 24 (1958), para 38. But the more accurate description of such an allegation is that it is an allegation of facts and matters from which it is to be inferred that the words were published of the plaintiff: *Bruce v Odhams Press Ltd* [1936] 1 KB 697; 52 TLR 224; [1936] 1 All ER 287.

The second usage is that illustrated by the authorities referred to by my Lord. It is an allegation that, by reason of extrinsic facts, the alleged libel was understood to be such though not defamatory in its natural and ordinary meaning, or, though defamatory in its natural and ordinary meaning, was understood in a further or extended defamatory sense.

The difference between the two usages may be illustrated by a simple example. Suppose it were written that 'the curate of 'Extown is a regular Casanova'.' It would, of course, be necessary for the plaintiff to aver and prove that he was at all material times the curate of Extown. That is the first usage. But, unless it could be said that the pejorative sense of the name 'Casanova' has become part of the English language, the plaintiff would go on to allege that by the said words the defendant meant and was understood to mean that the plaintiff was a fornicator, an adulterer, etc. And in such a case particulars would have to be given under O 19 r 6(2), which would, no doubt, consist of a short description of the life and habits of the notorious character referred to. That is the true meaning of an innuendo.

Perhaps an even better example of an innuendo was one given by Mr Faulks. Suppose it to be written that 'the advertising 'of Mr. X is in extremely bad taste and indeed grossly vulgar. Those words would probably be defamatory in their natural and ordinary meaning. But, in addition, it would be plainly open to the plaintiff to allege an innuendo, viz, that to those who knew he was a member of the Bar and were familiar with the etiquette of the profession the libel amounted to an allegation of professional misconduct.

A **[42]** It was urged upon me that the statements have to be decided by the trial judge in their natural and ordinary meaning whether they are defamatory of the plaintiff. The parties were all agreeable to proceed according to the 'Statement of Agreed Facts' in encl 21 and according to the 'Agreed Issues To Be Tried' in encl 22. There was therefore no necessity to B plead an innuendo and to introduce an extrinsic or extraneous fact as suggested by the plaintiff. The amendment to para 7 and the new paras 8, 9 and 10 of the statement of claim do not have any bearing on the construction to be given to the statements complained of. And the new para 10 of the statement of claim seeks to introduce words which were not even alleged to C have been uttered by the second defendant.

[43] The amended para 12 of the statement of claim is a classic example of an innuendo which this court ought not to allow to be pleaded following dutifully the case of *Grubb v Bristol United Press Ltd*.

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[44] While the new para 11 of the statement of claim ought not to be allowed at this stage because Abdul Wahab Patail J, has already heard the defendants' submissions on the preliminary point of law, namely, whether the statements in their natural and ordinary meaning as originally pleaded were E defamatory. To allow the new para 11 of the statement of claim would certainly be unfair to the defendants and no amount of costs could compensate the defendants for the prejudice caused. It is the judgment of this court that the plaintiff should not be permitted to change his case from time to time.

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[45] If the statements do not show a libel in their natural and ordinary meaning that would be the end of the matter. It was an afterthought on the part of the plaintiff to plead innuendo and to introduce extraneous facts in order to explain the hidden meaning behind the statements. Every innuendo G implies that there are facts to support it. The innuendo gives a further cause of action and the facts on which it is based must be proved. The plaintiff must have realised his predicament after he heard the submissions of the learned counsel for the defendants before Abdul Wahab Patail J.

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[46] With respect, the learned counsel for the plaintiff should know before filing the action on 11 October 2002 that way back in 1882 in the case of *Capital and Counties Bank v Henty* [1882] 7 App Cas 741, the House of Lords held that extrinsic evidence was necessary to show the meaning of an I innuendo other than its natural meaning. And that if a secondary meaning is to be imputed, then evidence must be given to prove it. An innuendo is an averment of facts and matters from which it is to be inferred that the words were published of the plaintiff. Lord De Grey CJ in *R v Horne* [1777] 2 Cowp 672 at p 684 explained lucidly the function of an innuendo in this way:

> For an innuendo means nothing more than the word id est, scilicet, 'or meaning' or 'aforesaid', as explanatory of a subject-matter, sufficiently expressed before; as, such a one, meaning the defendant, or such a subject, meaning the subject in question.

The words from which an innuendo is to be extracted must be fairly susceptible of the meaning sought to put upon them by the innuendo (*HK Hales v H Smiles* AIR 1937 Rang 105 at p 107). Is the meaning sought to be attributed to the language alleged to be libellous taken from a reasonable, natural or necessary interpretation of its terms? That would be the question to pose. A classic example of a defamatory inference can be seen in the case of *Lee Kuan Yew v JB Jeyaretnam* [1979] 1 MLJ 281. In that case, during an election rally for the 1976 general election, the defendant spoke about the performance of the then Prime Minister of Singapore in these words:

> I'm not very good in the management of my own personal fortunes but Mr Lee Kuan Yew has managed his personal fortunes very well. He is the Prime Minister of Singapore. His wife is the senior partner of Lee & Lee and his brother is the Director of several companies, including Tat Lee Bank in Market Street; the bank which was given a permit with alacrity, banking permit licence when other banks were having difficulty getting their licence. So Mr Lee Kuan Yew is very adept in managing his own personal fortunes but I am not …… if I become Prime Minister there will be no firm of JB Jeyaretnam & Company in Singapore because I wouldn't know how to manage my own personal fortunes

[47] The court, after taking those words in the context in which they were spoken – a speech at an election rally where people might well assume that the words were not meant to be flattering, and in the way in which an ordinary man hearing those words would take them, was satisfied that those words were defamatory of the then Prime Minister of Singapore in that those words in their natural and ordinary meaning indicated that the then Prime Minister of Singapore had procured preferential treatment for his brother and/or his wife to his own and/or their personal financial advantage, hence he was abusing his office. The court also held that the words alleged that the plaintiff had been guilty of nepotism and corruption, and that the plaintiff was unfit to be the Prime Minister.

[48] The defendant in the case of *Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 3 MLJ 322, in the course of an election rally in 1988, made statements, inter alia, to the following effect in relation to the death by suicide of Teh Cheang Wan, a government minister involved in a financial scandal. Teh Cheang Wan had taken an overclose of amytal barbiturate that caused his death. This was what the defendant said:

> Well, I hope before polling day we will be told how Mr. Teh Cheang Wan came by that poison…… it was reported in the Straits Times …. that Teh Cheang Wan wrote to the Prime Minister, I think a day before his death, …. ending that letter by saying I am very sorry I will do as you advise. My question to our Prime Minister tonight is thus. Did he respond to that letter from Mr. Teh Cheang Wan? And if he did respond, what was his response? …. and also we must know how is it (Teh) came by his death

[49] At the trial, the judge held that the implication was clear that the plaintiff not only 'advised' Teh to commit suicide, but also ensured that he was given the means to do it. The statement, in the context of the entire speech, suggested that the plaintiff had encouraged or countenanced the suicide for the improper purpose of covering up what, in a full trial, would have been a scandal most embarrassing to the government and the People's Action Party. The Court of Appeal vide *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 (CA), took a slightly different view and held that the words were defamatory in that they implied a 'cover-up' in respect of Teh's death and that the plaintiff had advised Teh prior to his death and that the advice had something to do with his death, and that the plaintiff was involved in Teh obtaining the poison used to commit suicide.

[50] When you plead an innuendo, particulars must be given and it is necessary to set out the facts in support of that innuendo. In the words of Lord Devlin in *Lewis v Daily Telegraph Ltd* [1964] AC 234, at p 281, 'For a legal innuendo, particulars are mandatory and the innuendo cannot be proved without them.' And such particulars must consist of extrinsic facts and matters beyond the ordinary and natural meaning of the words complained of. If that is not done, the innuendo will be struck out (*Grubb v Bristol United Press Ltd* and approved in *Lewis v Daily Telegraph Ltd*). That is the fear of the learned counsel for the plaintiff and that explains the plaintiff's application to amend the writ of summons and the statement of claim as seen in encl 30.

[51] I take note that the defendants here vehemently objected to the proposed amendments to the statement of claim. The defence was that the statements complained of were not defamatory in their natural and ordinary meaning. Obviously, the learned counsel for the defendants knew their law and objected to the proposed amendments. The objections were rightly taken. In *Liberace v Daily Mirror Newspapers Ltd* [1959] The Times, June 9, 17, there was only one cause of action and no innuendo was pleaded as it was claimed that the natural and ordinary meaning of the words was clear. That must also be the stand of the plaintiff when he filed his claim on 11 October 2002. And now after hearing the submissions of the learned counsel for the defendants before Abdul Wahab Patail J, the plaintiff wants to amend his

statement of claim by pleading innuendo and sought to introduce extrinsic facts to support that innuendo. The plaintiff should not be allowed to shift his stand to the detriment and prejudice of the defendants. As I said, such prejudice cannot be compensated by costs.

[52] Inter alia, the grounds for seeking the amendments are varied and they have been reproduced in the early part of this judgment. According to the plaintiff, the issues in controversy will be more clearly defined (see ground (v) as set out in encl 30). In my judgment, the issues have been defined clearly in the 'Agreed Issues To Be Tried' as reproduced earlier. Sad to say that none of the amendments has made the issues in controversy clearer. In fact, the amendments have raised new facts and issues.

[53] In regard to the argument that the proposed amendments would be able to dispose of the issues in dispute more expeditiously (see ground (vi) as set out in encl 30), I have this to say. Far from expediting the disposal of the matter, these amendments will delay the proceedings further. It must be borne in mind that the 'Statement of Agreed Facts' in encl 21 and the 'Agreed Issues To Be Tried' in encl 22 were dated 1 October 2003, while the application to amend in encl 30 was filed on 5 May 2005. There was indeed an inordinate delay of 1 year 7 months 4 days (*Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 4 MLJ 465).

[54] In my judgment, the proposed amendments to the Statement of Claim was nothing more than a tactical manoeuvre which can be construed as an abuse of the process of the court (*Tetuan Tanjung Teras & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd*). The proposed amendments to the statement of claim would have the effect of nullifying mutual concessions and admissions that the parties have made in the 'Statement of Agreed Facts' and would also render the exercise of securing the 'Agreed Issues To Be Tried' ineffectual or useless. It is also my judgment that the proposed amendments to the statement of claim may be construed as an attempt to have a second bite at the proverbial cherry especially after having the benefit of hearing the submissions of the learned counsel for the defendants before Abdul Wahab Patail J.

[55] I am grateful to counsel on all sides for their well researched arguments. Still on the issue of the proposed amendments, I must categorically say that the Ketteman principles enunciated by Lord Brandon of Oakbrook in *Ketteman and Others v Hansel Properties Ltd. And Others* [1987] 1 AC 189, HL and adopted by our Court of Appeal in *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649, require some fine tuning because a number of factors has to be taken into account when the court considers an application to amend the pleadings. Lord Brandon of Oakbrook in the

A *Ketteman* sets out the principles governing the exercise of the court's discretion in granting amendments. At p 212 of the report, Lord Brandon of Oakbrook in the *Ketteman* succinctly said:

> First, all such amendments should be made as are necessary to enable the real
B questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly,
C however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs

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[56] I should adopt the first proposition of Lord Brandon of Oakbrook in *Ketteman* and in doing so, the position would be like this. That it is only if the proposed amendments are found to be necessary then the court would go
E on to consider the other factors. This is the approach recommended by Lord Keith of Kinkel in the *Ketteman* at p 203 of the report:

> Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that fails to be exercised in accordance with well-settled principles.

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And further down the same page, Lord Keith of Kinkel in the *Ketteman* had this to say:

> The rule is that amendment should be allowed if necessary to enable the true issues
G in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs. In *Clarapede & Co v Commercial Union Association* [1883] 32 WR 262, p 263, Brett MR said:

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> 'The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made'.

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[57] It was quite obvious that the proposed amendments would put the defendants in 'a position that they must be injured' and, consequently, the proposed amendments 'ought not to be' allowed.

[58] In *GL Baker Ltd v Medway Building And Supplies, Ltd,* the Court of Appeal allowed the proposed amendment there because 'the pleadings as they stood … were not... so framed as to enable the real question in controversy to be determined' (see p 546 of the All ER). Here, from the very beginning the plaintiff's case was that the statements complained of were defamatory of the plaintiff in their natural and ordinary meaning and as alluded to earlier the proposed amendments were mere after thoughts on the part of the plaintiff and nothing else.

[59] For the reasons as adumbrated above, I allowed the appeals in encls 38 and 39 with costs.

Appeal allowed with costs.

Reported by Sally Kee